



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### LEGISLATIVE PROPOSAL (T&E-2006-04) *ATTORNEY-CLIENT PRIVILEGE: SURVIVAL AFTER DEATH OF CLIENT*

To: State Bar Office of Government Affairs

From: Tracey Potts, Chair, Executive Committee  
Shirley L. Kovar, Chair, Litigation Committee  
Neil F. Horton, Member, Executive Committee

Re: Amendment of Evidence Code §954 and Probate Code §12252

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#### **Digest:**

The proposed bill would restore to California law the principle that the attorney-client privilege continues indefinitely after the client's death and provides a mechanism for waiving the privilege when it is in the best interests of the deceased client's beneficiaries and other interested persons.

#### **Reasons to change the law**

Before 1965, California law, like the majority of other jurisdictions, assumed that the attorney-client privilege survived the client's death.<sup>1</sup> For example, in 1965, when the legislature consolidated and revised the rules of evidence from existing statutes, it kept specific exceptions to the attorney-client privilege for a deceased client, such as allowing the client's attorney to testify about a communication relevant to an issue between parties all of whom claim through the

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<sup>1</sup> California Law Revision Comment to Evidence Code §954 [7 Cal.L.Rev.Comm. Reports 1 (1965)]; *Swidler & Berlin v. United States* (1998) 524 U.S. 399, 404 - 405.

deceased client<sup>2</sup> or about the deceased client's intent regarding a writing affecting property interests.<sup>3</sup> These exceptions would not have been necessary if death had signaled the end of the attorney's duty to keep his client's confidences.

Under the 1965 legislation, the attorney-client privilege did not indefinitely survive the client's death, but instead remained in effect until the probate of the deceased client's estate ended and the court discharged the personal representative. The Law Revision Commission, which authored the bill, recognized that "good reason" exists to maintain "the privilege while the estate was being administered – particularly if the estate is involved in litigation...." On the other hand, the Commission opined, "there is little reason to preserve secrecy at the expense of excluding relevant evidence after the estate is wound up and the representative is discharged."<sup>4</sup>

Experience since 1965 has undermined the assumption that the privilege could be abandoned after a deceased client's personal representative has been discharged without harming the societal goals that the attorney-client privilege embodies. For example, on Bing Crosby's death, his assets, including his recording contracts, were probated. During the probate proceedings, a partnership, HLC Properties, Ltd., was created which received Crosby's assets, including the recording contracts, on his estate's distribution. The court then discharged his widow as personal representative. Later, HLC sued a record company, MCA, for unpaid royalties. MCA sought, and the trial court ordered HLC to turn over, documents containing Crosby's past communications with his attorneys. In *HLC Properties, Ltd. v. Superior Court*,<sup>5</sup> the California Supreme Court upheld the trial court. Because the attorney-client privilege, like other evidentiary privileges, is governed exclusively by statute,<sup>6</sup> the court did not consider whether the assumptions behind the statutory rule ending the attorney-client privilege on the discharge of a client's personal representative remain valid.

Requiring a deceased client's successor in interest to turn over documents reflecting confidential attorney-client communications weakens the values that the attorney-client privilege seeks to protect. The purpose of the attorney-client privilege is to encourage the "full and frank communication between attorneys and their clients...." Doing so promotes the "broader public interest in the observance of law and the administration of justice."<sup>7</sup> The privilege achieves its higher ends by securing clients' communications with their attorneys "from the consequences or the apprehension of disclosure."<sup>8</sup>

California is the only jurisdiction in the United States that allows the attorney-client privilege to expire when the decedent's personal representative is discharged.<sup>9</sup> The United States Supreme Court specifically rejected the notion that, when the client has died, the attorney-client privilege should no longer prevent disclosure of confidential communications, relying in part on the "great body" of case law that "supports, either by holding or considered dicta, the position that the privilege does survive...."<sup>10</sup>

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<sup>2</sup> Evidence Code §957.

<sup>3</sup> Evidence Code §960.

<sup>4</sup> California Law Revision Comment to Evidence Code §954 [7 Cal.L.Rev.Comm. Reports 1 (1965)].

<sup>5</sup> *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal. 4<sup>th</sup> 54.

<sup>6</sup> *Id.* at 59; Law Revision Comment to Evidence Code §911 [7 Cal.L.Rev.Comm. Reports 1 (1965)].

<sup>7</sup> *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.

<sup>8</sup> *Hunt v. Blackburn* (1888) 128 U.S. 464, 470.

<sup>9</sup> *Swidler & Berlin*, 524 U.S. at 405, n. 2.

<sup>10</sup> *Id.* at 385.

Conditioning the existence of the attorney-client privilege, after the client's death, on the existence of a personal representative leads to inconsistent results. Under current law, whether the privilege will continue after a client's death will depend on the form of the client's estate plan or whether the client, during life, conducted business individually or through an entity. If Bing Crosby had created a revocable trust to pass his royalties at death without probate, his successor trustee would have been able to claim the privilege.<sup>11</sup> If, like the individuals who formed MCA, he incorporated his business during life, his corporation would have been able to claim the privilege.<sup>12</sup> But the continuance of the attorney-client privilege after a client's death should not turn on fine distinctions that are unrelated to the privilege's underlying purposes, such as whether the decedent passed property at death by a will or by a revocable trust. Failing to change the statute will not only lead to other unjust results, it eventually will undermine the principles for which the privilege stands.

### **How the current statute works**

Whether the attorney-client privilege applies depends on whether a holder of the attorney-client privilege exists to claim the privilege. The "holder of the privilege" means:

- (a) The client when he has no guardian or conservator.
- (b) A guardian or conservator of the client when the client has a guardian or conservator.
- (c) The personal representative of the client if the client is dead.
- (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence.<sup>13</sup>

The client's lawyer must claim the privilege, but the lawyer "may not claim the privilege if there is no holder of the privilege in existence...."<sup>14</sup> The Law Revision Commission comments that the privilege ceases to exist "when the client's estate is finally distributed and his personal representative is discharged."<sup>15</sup>

### **How the proposed bill will change the law**

The proposed bill will amend Evidence Code §954(c) by removing the condition that the lawyer can not claim the privilege if no one holds the privilege. Under Evidence Code §955, then, the lawyer will be obligated to claim the privilege, even if the client is dead, whenever the lawyer is present when the communication is sought to be disclosed. The proposed bill also will allow the privilege to be waived by adding a clause to Evidence Code §954(c) instructing the lawyer that he can not claim the privilege if he is so instructed by the holder of the privilege.

In addition, the proposed bill amends Probate Code §12252 to authorize the court to appoint a personal representative for purposes of waiving the privilege where the court has discharged a personal representative and disclosure is sought as to an attorney-client privileged communication.

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<sup>11</sup> *Moeller v. Superior Court* (1997) 46 Cal. 4th 1124.

<sup>12</sup> Evidence Code §953 and §954.

<sup>13</sup> Evidence Code §953.

<sup>14</sup> Evidence Code §954(c).

<sup>15</sup> Law Revision Commission Comment to Evidence Code §954 [7 Cal.L.Rev.Comm. Reports 1 (1965)].

## **Documentation**

In Burford and Nunan, *Dead Man Talking: Is There Life After Death for the Attorney-Client Privilege?*, 11 California Trusts and Estates Quarterly, Issue 2 (Summer 2005), the authors call for a re-examination of the current law to ensure consistency with current post-death administration and to provide clarity as to the privilege's existence after a client's death.

## **Pending Litigation**

None known.

## **Fiscal Impact**

The proposed legislation will increase court filing fees slightly in the few instances that a petitioner seeks appointment as personal representative for purposes of waiving the privilege.

## **Germaneness**

Protecting client confidences is a major concern for trusts and estate lawyers. The subject matter of the legislation comes within the scope of the interests and knowledge of the Trusts and Estates Section of the State Bar of California.

## **Text of Proposal**

SECTION 1. Section 954 of the Evidence Code is amended to read:

954. Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:

- (a) The holder of the privilege;
- (b) A person who is authorized to claim the privilege by the holder of the privilege; or
- (c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege ~~if there is no holder of the privilege in existence or if he is instructed not to claim the privilege by the holder of the privilege or other a person authorized to permit disclosure.~~

The relationship of attorney and client shall exist between a law corporation as defined in Article 10 (commencing with Section 6160) of Chapter 4 of Division 3 of the Business and Professions Code and the persons to whom it renders professional services, as well as between such persons and members of the State Bar employed by such corporation to render services to such persons. The word "persons" as used in this subdivision includes partnerships, corporations, limited liability companies, associations and other groups and entities.

SEC. 2. Section 12252 of the Probate Code is amended to read:

12252. If subsequent administration of an estate is necessary after the personal representative has been discharged because other property is discovered, *disclosure is sought of a communication that is deemed privileged in the absence of a waiver by a personal representative*

*under Article 3 of Chapter 4 of Division 8 of the Evidence Code (subject to Section 12252.1), or because it becomes necessary or proper for any other cause:*

(a) The court shall appoint as personal representative the person entitled to appointment in the same order as is directed in relation to an original appointment, except that the person who served as personal representative at the time of the order of discharge has priority.

(b) Notice of hearing of the appointment shall be given as provided in Section 1220 to the person who served as personal representative at the time of the order of discharge and to other interested persons. If property has been distributed to the State of California, a copy of any petition for subsequent appointment of a personal representative and the notice of hearing shall be given as provided in Section 1220 to the Controller.